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No. 84-978



IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

EXXON CORPORATION, THE BF GOODRICH COMPANY,
UNION CARBIDE CORPORATION, MONSANTO COMPANY AND
TENNECO CHEMICALS, INC.,

Appellants,

VS.

ROBERT HUNT, Administrator of New Jersey Spill Compensation Fund;
CLIFFORD A. GOLDMAN, Treasurer of the State of New Jersey;
SIDNEY GLASER, Director of the Division of Taxation;
JERRY F. ENGLISH, Commissioner of Environmental Protection; and
THE STATE OF NEW JERSEY,

Appellees.

On Appeal from the Supreme Court of New Jersey

APPELLANTS' SUPPLEMENTAL BRIEF

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APPELLANTS' SUPPLEMENTAL BRIEF

Appellants submit this Supplemental Brief pursuant to Rule 16.6 to respond to an intervening matter arising since their last filing—the interpretation of Section 114(c) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (“Superfund”), 42 U.S.C. § 9614(c), as set forth in

the brief *amicus curiae* submitted by the Solicitor General of the United States.

Appellants concur with the Solicitor General's conclusion that probable jurisdiction should be noted and that the judgment of the Supreme Court of New Jersey should be reversed. (Br. 21). Appellants take issue, however, with the narrow scope of the remand recommended by the Solicitor General and the interpretation of Section 114(c) of Superfund that underlies this recommendation.

The Solicitor General concludes that of the five uses that can be made of money in the New Jersey Fund, only one is preempted by Section 114(c) of Superfund. (Br. 19-20). Specifically, the Solicitor General maintains that damages sustained and clean-up costs are preempted from payment from the New Jersey Fund if incurred by parties other than the State (Br. 20), but that expenditures from the New Jersey Fund for the same damages and costs by the State are not preempted. (Br. 12).¹

The Solicitor General's brief focuses on the definitions of the terms "claim," "claimant" and "compensation." (Br. 11). First, "claim" is defined in Superfund as "a demand in writing for a sum certain," 42 U.S.C. § 9601(4), and "claimant" as "any person who presents a claim for compensation under this chapter," *id.*, at § 9601(5). The Solicitor General's brief, however, ignores the fact that the definition of "person" includes a "State," "commission" or "political subdivision of a state." *Id.* at § 9601(21).

Second, because compensation is not defined by Superfund, the Solicitor General resorts to a dictionary definition, which

¹The Solicitor General also concludes that expenditures from the New Jersey Fund on research as to the effects of spills and improved clean-up operations, administrative and personnel costs and research on ocean pollution are not preempted. (Br. 20). Appellants agree. The record below indicates, however, that these three items have constituted less than six percent of the expenditures from the New Jersey Fund. (*See Juris. St.* 4). Moreover, expenditures on both areas of research are limited to the amount of interest credited to the New Jersey Fund. N.J.S. 58:10-23.11o(3) & (5).

defines "compensation" as "indemnification; *** making whole; giving an equivalent or substitute of equal value[;] [t]hat which is necessary to restore an injured party to his former position." (Br. 11). Based upon the above definitions, the Solicitor General concludes that the response costs of the State are not encompassed in "compensation for claims for any costs of response or damages . . ." as used in Section 114(c) because, where the State simply decides to spend New Jersey Fund money to remove or treat hazardous waste, there is no written demand for a sum certain" and the State is not indemnifying anyone or making anyone whole. (Br. 12).

I.

The Solicitor General's analysis of Superfund ignores the New Jersey Act's statutory framework and the relationship of the New Jersey Fund to the New Jersey Department of Environmental Protection (DEP) and is inconsistent with the terms of Superfund itself. The New Jersey Fund was established as a nonlapsing revolving fund in the Department of Treasury, which was to be credited with all taxes and penalties related to the New Jersey Act. N.J.S. 58:10-23.11i. Significantly, the purpose of the tax levied for the New Jersey Fund is "to insure *compensation* for cleanup costs and damages associated with any discharge of hazardous substances." *Id.* at 23.11h(a) (emphasis added).

An administrator appointed by the State Treasurer is the chief executive of the New Jersey Fund. N.J.S. 58:10-23.11j. The Fund is to be strictly liable, without regard to fault, for all cleanup and removal costs and for all direct and indirect damages, no matter by whom sustained. N.J.S. 58:10-23.11g. When the DEP acts to remove a discharge or contracts to secure prospective removal services, it is authorized to draw upon money available in the Fund. N.J.S. 58:10-23.11f(a). However, under statutorily-defined circumstances the administrator of the New Jersey Fund must approve DEP's applications for payment, N.J.S. 58:10-23.11f(c), just as he would in paying any other claim made against the Fund. Moreover,

payment of any clean-up costs or damages by the New Jersey Fund is conditioned upon the administrator acquiring, by subrogation, all rights of the claimant to recover such costs or damages from the discharger or responsible party. N.J.S. 58:10-23.11q.

As discussed, "person" is defined in Superfund to include the State, a commission or political subdivision of a state. "Person" is similarly defined in the New Jersey Act to include "the State of New Jersey" and any of its political subdivisions or agents. N.J.S. 58:10-23.11b(o). Using the definition of "claim" and "claimant" as set forth in Superfund, therefore, the procedure whereby the New Jersey Fund pays the specific response costs of the DEP is without question "compensation" to "a person who has presented a demand in writing for a sum certain."

The Solicitor General's reliance on a dictionary definition of "compensation," in support of his argument that Section 114(c) preempts only claims by "third parties seeking to be made whole" (Br. 12), rests on the faulty premise that a state's claim for reimbursement of response costs is different from a third party claim for "compensation." In fact, under Superfund both types of claims seek relief in the nature of restitution. Compare the Solicitor General's dictionary definition of "compensation" with *United States v. Northeastern Pharmaceutical and Chemical Co.*, 19 Envir. Rep. Cas. [E.R.C.] 2186, 2188 (W.D. Mo. Sept. 30, 1983) (restitution has "the ultimate goal to return the plaintiff to his status quo"); *id.* at 2188-89; *United States v. Reilly Tar & Chemical Corp.*, 20 E.R.C. 1052, 1056 (D. Minn. June 23, 1983); *United States v. Wade*, 20 E.R.C. 1853, 1855 (E.D. Pa. Feb. 21, 1984) (actions by the government to recover response costs under Superfund are equitable in nature, akin to restitution). Thus, reimbursement of state response costs is "compensation," just like reimbursement of third party claims.

Moreover, Section 111, 42 U.S.C. § 9611, which authorizes the assertion of state claims against the Superfund, and Section 112, 42 U.S.C. § 9612, which specifies the procedures governing claims against the Superfund, clearly treat reim-

bursment of state response costs and damages as satisfaction of a "claim" by the State. See, e.g., *State of New York v. General Electric Co.*, 592 F. Supp. 291, 299-301 (N.D.N.Y. 1984), where the court assumed that a state planning to apply for reimbursement from Superfund is subject to the claims procedures of Section 112. See also *United States v. Allied Chemical Corp.*, 587 F. Supp. 1205, 1207 (N.D. Cal. 1984).

The Solicitor General's refusal to recognize that a state agency seeking to recover its response costs from a state fund is seeking "compensation for claims" within the meaning of Section 114(c) not only is inconsistent with the meaning of those terms, but also conflicts with other provisions of Section 114(c) or closely related provisions of Superfund. Most importantly, the second sentence of Section 114(c) provides that "[n]othing in this section shall preclude any state from . . . imposing a tax or fee upon any person or upon any substance in order to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for response to a release of hazardous substances which affects such State." If, as the Solicitor General suggests, the preemptive effect of Section 114(c) does not extend to payment of any government response costs, it would have made no sense for Congress to have granted states permission to impose a special tax solely to purchase the response equipment which they utilize in incurring response costs. Therefore, the exception to Section 114(c), which allows such a special tax for this limited purpose, proves that the New Jersey Fund may not be used to pay all state response costs in the manner envisioned by the Solicitor General.

A comparison of Section 114(b) with Section 114(c) of Superfund also reveals the Solicitor General's error. The former section provides that "any person who receives compensation for removal costs . . . pursuant to [Superfund] shall be precluded from recovering compensation for the same removal costs . . . pursuant to any other State or Federal law." The Solicitor General's argument that DEP's reimbursement from the New Jersey Fund does not constitute "compensation for

claims for any costs of response" within the meaning of Section 114(c) implies that DEP is not limited by Section 114(b)'s proscription against "any person . . . receiv[ing] compensation for removal costs" from both State funds and Superfund. But surely Congress contemplated that, if DEP received compensation from the New Jersey Fund for its response costs, it would be barred by Section 114(b) from being paid again by virtue of an application to Superfund. DEP must, therefore, be a "person who receives compensation for removal costs" within the meaning of Section 114(b), and thus should similarly be a "claimant" for "compensation" within the meaning of Section 114(c). 42 U.S.C. §§ 9614(b), (c).

Finally, the Solicitor General's attempt to limit the preemptive scope of Section 114(c) to third-party claims ignores the use of the word "damages" in that provision. The term "damages" is defined in Superfund, 42 U.S.C. § 9601(6), as "damages for injury or loss of natural resources as set forth in section 9607(a) or 9611(b) of this title." However, only the federal and state governments—not third parties—are entitled to assert claims against the Superfund for such damages and to bring actions in court for their recovery. 42 U.S.C. §§ 9611(a), (b); 9607(a)(4)(C), (f). Assuming, as the Solicitor General does, that all the terms of Section 114(c) take their meaning from Superfund rather than state law, the reference in Section 114(c) to preemption of "damage" claims clearly contemplates preemption of state funds used to reimburse the state for natural resource damage claims. Thus, Section 114(c) cannot be limited to the preemption of payment of only third-party claims.²

²The Solicitor General states that the parties' and lower courts' interpretation of Section 114(c) would result in redundancy. (Br. 10, 11). A more careful reading of this section discloses there is no redundancy in their interpretation and that, in fact, their construction of Section 114(c) parallels the permissible uses of Superfund money set forth in 42 U.S.C. § 9611. Compare 42 U.S.C. § 9614(c) (preemption) with *id.* § 9611 (permissible uses). The first use of the word "claims" in Section 114(c) refers to demands on the particular State fund, in this case the New Jersey Fund. The second use of the word "claims" refers to demands made on the Superfund.

II.

Far from supporting his position, the legislative history of Superfund undermines the Solicitor General's interpretation of Section 114(c). Contrary to his contentions (Br. 13), H.R. 85 did not deal exclusively with oil spills. H.R. 85, 96th Cong. 2d Sess. (1980). This bill was amended to create a fund for spills of hazardous wastes, other than petroleum, into navigable waters. *Id.* § 301. Contributions into state funds for the removal of both oil and other hazardous substances were preempted in § 110 and § 302, respectively. These sections of the bill provided that "no person may be required to contribute to any fund, the purpose of which is to compensate for a loss which is a *compensable damage* under title V . . ." of the bill. *See id.* §§ 110(a)(2), 302(a) (emphasis added). Title V, in turn, expressly defined "compensable damages" to include damages asserted for removal costs, *id.* § 531(a)(1), for which a State may assert a claim, *id.* § 103(a)(1), (b)(1); *id.* § 301(a)(1). The House Merchant Marine and Fisheries Committee Report, quoted at length by the Solicitor General (Br. 13-14), clearly provides that states may assert "claims" for removal costs under H.R. 85:

"A State can and is expected to be a claimant under the legislation. In this manner, the costs of many of the oil pollution actions taken by a State will be compensable under a uniform, simple, and practicable system. Once a State expends money for removal costs, it may claim compensation for that item of damages under the procedures outlined in the bill."

H.R. Rep. No. 172, 96th Cong., 1st Sess. 23 (1979) (emphasis added), *reprinted in* 1 Library of Congress, Sen. Comm. on Environment and Public Works, 97th Cong., 2d Sess., *A Legislative History of [Superfund]*, Public Law 96-510, at 533 (Comm. Print 1983).

Since the definition of "compensable damages" in H.R. 85, cited in the Solicitor General's brief, included State claims for removal costs, the legislative debates on H.R. 85 further un-

dercut the Government's position that the preemption provisions of that bill "did not apply broadly to state payments or expenditures relating to oil spills. . . ." (Br. 13). *See, e.g.*, 126 Cong. Rec. 26196-26197 (1980) (remarks of Rep. Biaggi); *id.* at 26209 (remarks of Rep. Cleveland). *Accord id.* at 26207 (remarks of Rep. Roberts); *id.* at 26198 (remarks of Rep. Snyder).

Also, under the Administration's proposal, S. 1341, 96th Cong. 1st Sess. (1979), States could assert claims for removal costs of oil or hazardous substance spills, *id.* §§607(a)(1), (b)(1)(B). Thus, S. 1341's preemption provision clearly applied to contributions to a State fund the purpose of which was to pay for State claims for removal costs relating to oil or hazardous substance spills. *Id.* § 612(a)(2).

Finally, S. 1480, 96th Cong., 1st Sess. (1979), as originally proposed applied only to discharges of hazardous substances. *Id.* § 4(a). It did not initially involve a feedstock tax and it expressly disclaimed a preemptive intent, *id.* § 8. Amendments were introduced to it by Senator Cannon on September 24, 1980. The written explanation for Amendment No. 2387 containing the preemption language was that it was to prevent States from establishing their own overlapping and duplicative systems and to make S. 1480 consistent with H.R. 85 and S. 1341. 126 Cong. Rec. 27086 (1980).

In sum, the legislative histories of Superfund's predecessor bills clearly indicate that the purpose of the preemption language in each of them was to prevent duplicate state funds for the purpose of paying claims provided for in the bills, all of which permitted state claims for costs. *See, e.g.*, 126 Cong. Rec. 27086 (1980) (written explanation of Cannon amendment); *id.* at 30949 (remarks of Sen. Randolph); *id.* at 26196-26197 (remarks of Rep. Biaggi); *id.* at 26197 (remarks of Rep. Florio); *id.* at 26202 (remarks of Rep. Livingston).³

³The colloquy between Senators Bradley and Randolph (Br. 17-18) is not inconsistent with appellants' reading of the statute. The thrust of that dialogue, as quoted and emphasized by the Solicitor General, is that there is no preemption with respect to state fund payments of expenses which do not

CONCLUSION

The decision of the New Jersey Supreme Court should be summarily reversed and remanded with instructions that Section 114(c)'s preemption is not limited to the payment of claims made by third parties, but also includes the payment of claims made by DEP. In the alternative, this appeal should be accorded plenary review.

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June 6, 1985

constitute "compensible damages as defined in this legislation." The Senators could not have meant that Section 114(c) preempts only the payment of "damage" claims, when it also explicitly refers to "any costs of response" or other "claims which may be compensated" by Superfund. It is their focus on "compensibility" which is significant: Only "compensation for claims" is preempted by Section 114(c), as both Senators agreed, but such compensation can include that sought by State agencies, such as DEP.